

DELTA PROTECTION COMMISSION

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CA State Transportation Agency

*CA Department of Food and
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CA Natural Resources Agency

CA State Lands Commission

June 26, 2014

Mr. Ryan Wulff
National Marine Fisheries Service
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814

**Re: Draft Bay Delta Conservation Plan and associated Draft
Environmental Impact Report/Environmental Impact Statement**

Dear Mr. Wulff:

The Delta Protection Commission (Commission) is a California State agency created by 1992 legislation that declared “the Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and that it is the policy of the state to recognize, preserve and protect those resources of the Delta for the use and enjoyment of current and future generations” (California Public Resources Code (PRC) section 29701).

The Delta Reform Act of 2009 (Chapter 5, California Statutes of 2009-10 Seventh Extraordinary Session) declared that the basic goals for the Delta are to provide a more reliable water supply for California and protect, restore and enhance the Delta ecosystem, “in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place” (PRC section 29702). Further, the Commission is identified as a “forum for Delta residents to engage in decisions regarding actions to recognize and enhance the unique cultural, recreational, and agricultural resources of the Delta” (PRC section 29703.5(a)). In addition, the Commission has been identified to lead and support a variety of recommendations in the Delta Stewardship Council’s Delta Plan, many related to protecting and enhancing the Delta’s unique values.

Another primary Commission responsibility is to prepare and implement a comprehensive long-term Land Use and Resource Management Plan (LURMP) for the primary zone of the Delta. General plans of the five Delta counties are required to be consistent with the LURMP. PRC Section 29760(b) sets out policy requirements for the LURMP, which include the following:

- Protect and preserve the cultural values and economic vitality that reflect the history, natural heritage, and human resources of the delta.
- Conserve and protect the quality of renewable resources.
- Preserve and protect agricultural viability.
- Restore, improve, and manage levee systems.
- Preserve and protect water quality of the Delta.
- Preserve and protect open-space and outdoor recreational opportunities.
- Protect the Delta from any development that results in any significant loss of habitat or agricultural land.

The Commission has determined it is appropriate to review the proposed Bay Delta Conservation Plan (BDCP, or “project”) and the associated Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS) in relation to the LURMP. LURMP policies have been adopted to protect and enhance the Delta’s unique resources. To the extent that any project contradicts those policies, whether or not officially under the jurisdiction of the Commission, it is likely that the project will harm or reduce the unique values of the Delta.

It is worth stating at the outset that the BDCP and its associated DEIR/EIS represent an immensely complicated project and analysis, and it is challenging to navigate the entirety of the proposal to determine its impacts on the unique cultural, recreational, natural resource and agricultural values of the Delta. The project review period also occurs during a time when drought-related activities are competing for time and attention with the review of this proposal. Important components of the BDCP (especially the anticipated Implementing Agreement) have only recently been released. This creates an additional challenge for interested parties to review the full context of the proposal.

As such, our review of the project has attempted to be thorough with regard to the most significant impacts to the Delta region, even though it is not comprehensive. The Commission’s comments are organized into three primary areas of concern, as follows:

A. INADEQUATE CHARACTERIZATION OF IMPACTS TO DELTA AS PLACE

While we appreciate the effort and consideration that went into the proposed BDCP, our primary criticism of the effort is that it was completed with an overwhelming focus on one of the co-equal goals (a more reliable water supply for California; more specifically, in our view, a more reliable water supply for south-of-Delta exporters) and a distant secondary focus on the other co-equal goal (protect, restore and enhance the Delta ecosystem). This almost entirely disregards the essential context provided in law -- protection and enhancement of the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place.

The DEIR/EIS does not adequately address or mitigate BDCP’s effects (both from the proposed tunnel construction and the other conservation measures) on cumulative impacts to “Delta as Place”: the agricultural, recreation, aesthetic, historic and community character resources of the Delta. In cases where there are not specific, feasible and enforceable mitigation measures provided, there should be specific performance standards that will mitigate the significant effects of the project.

Community Impacts: The BDCP estimates numerous impacts to Delta residents and visitors from construction activities, including exposure to construction noise at all hours, truck traffic leading to unacceptable level-of-service and pavement conditions, impacts to local farm and resident traffic from road relocations, new sources of light/glare that will adversely affect views in the area, effects on regional/local utilities, increase in safety hazards, and visual impacts to communities near intake and tunnel construction. The attached matrix outlines some of the specific concerns related to these issues. The DEIR/EIS discussion seems to suggest that abandonment of buildings and residences during the construction period will be temporary, when it is more likely that this will be a permanent abandonment and contribute to community blight and decline. The DEIR/EIS should identify explicit mitigation measures for these impacts.

As the BDCP states, the visual character of the Delta is strongly identified by its agricultural and water-based Delta landscapes and communities. As stated in DEIR/EIS Chapter 17 (page 205, lines 2-7): “These conservation measures would alter the Delta landscape by incrementally, and substantially, introducing elements into the study area over time. This could pave the way for the gradual transition of a much-valued cultural and regional landscape and make it easier for other similar projects to be implemented over time because of the devalued baseline conditions, compared to Existing Conditions, if conservation measures are not planned and implemented in a manner that protects visual resources.”

In addition, the DEIR/EIS does not mitigate for the hydraulic impacts associated with construction of cofferdams in flood conveyance channels. Flood protection is critical for Delta communities as well as the greater region, and these impacts must be discussed and mitigated. In addition, the DEIR/EIS does not mitigate for the impacts to structural integrity of levees from construction traffic.

To attempt to better depict the actual impacts of some of the construction activities of the BDCP, the Commission undertook an effort to develop visual simulations of construction activities at some construction locations, based on information available in the BDCP. These materials have been shared with the project proponent.

Recreation Impacts: The BDCP undercounts recreational spending in the Delta by \$76 million, as compared with the recreational spending estimated in the Commission’s Economic Sustainability Plan (ESP) - \$236 million in DEIR/EIS, \$312 million in the ESP. There also will be reduced boating opportunities in the vicinity of riverside construction and barge traffic, with resulting significant economic impacts to marinas from reduced boat traffic. Over a construction period lasting up to 10 years, it is likely that some number of these marinas will be unable to survive these negative impacts to their businesses. These impacts must be mitigated.

There also will be a reduction in Delta day visitors due to road relocation and avoidance of truck traffic, and resulting impacts on the Delta economy. In addition, CM 20 proposes a watercraft inspection program that will limit boating access to Delta waterways to specific points of entry. Chapter 15 (page 15-103) of the DEIR/EIS states that “Although there could be a marginal effect on the recreation experience if boaters are delayed at the boat launch, it is expected that there

would be no adverse effect on recreational boating.” Given the level of boating use in the Delta (6.4 million boating visitor days per year, according to the ESP) and the likely number of inspection stations, it is highly likely that many recreational boaters will seek other boating opportunities outside the Delta rather than wait to clear an inspection station. Finally, there will be a negative impact on Delta park facilities from tunnel construction and other conservation measures.

The DEIR/EIS should identify explicit mitigation measures for the significant and unavoidable recreation impacts caused by BDCP tunnel construction and operation, as well as CM 20 (watercraft inspection).

Agriculture Impacts: Conversion of agricultural land for habitat restoration in BDCP Conservation Measures 2 through 22 (CMs 2-22), especially tidal marsh restoration, is significant and dwarfs the conversion of agricultural land for tunnel construction activities. Combined, approximately 14% (70,000 acres) of Delta farmland is proposed for outright conversion as a result of tidal marsh restoration or tunnel construction, while an additional more than 10,000 acres would be agriculturally-restricted through seasonal flooding or other proposed restoration activities. The agricultural impacts of CMs 2-22 are not adequately analyzed due to the conceptual level of the proposed measures. This is a significant shortcoming to capturing the full agricultural impacts (as well as other “Delta as Place” impacts) from the proposed conservation measures.

The ESP estimated the economic impacts to Delta agriculture from the BDCP conservation measures as they existed in the 2010 BDCP documents; these conservation measures are largely unchanged and are now known as CMs 2-22. However, the DEIR/EIS does not cite the estimates of agricultural revenue loss from CMs 2-22 that is part of the ESP (estimated at \$32-\$132 million of direct impact annually depending on the locations used for restoration activities), or even utilize the agricultural data generated for the 2013 BDCP statewide economic impact study (estimated at \$89 million of direct impact annually).

Further, to minimize the impact on the Delta economy and communities, restoration efforts should focus first on existing publicly-owned land or land owned by conservation entities intended for restoration activities before acquiring productive agricultural land for restoration.

In addition to these direct conversions of agricultural land, there also are significant indirect negative impacts on Delta agricultural land. These include changes to groundwater levels (both increase and decrease) occurring as a result of tunnel construction and restoration activities on adjoining lands, and the corresponding impact on the root zones of crops; and disruption of drainage and irrigation facilities from tunnel construction.

It also is worth noting that the Commission has a role in reviewing any land-use changes on Staten Island, the proposed site of tunnel construction areas and tunnel material placement. Staten Island is subject to a 2001 conservation easement and a 2002 Memorandum of Understanding between the Commission and the Department of Water Resources (DWR). The

stated intent of the conservation easement is that Staten Island be protected from “any actions that would result in the conversion of any material portion... away from agricultural use.” DWR is the holder of the conservation easement and legally responsible for its enforcement. To date, the Commission has not been consulted related to these obligations, nor has it received a restoration plan for review as required by the conservation easement. It is difficult to understand how DWR intends to comply with these requirements and manage the apparent conflict of interest between its legal obligations to protect Staten Island against conversions from agricultural use and its interest in advancing the BDCP.

The primary mitigation measure for agricultural impacts is the proposed Agricultural Lands Stewardship Plan (ALSP – Mitigation Measure AG-1). While the recent draft version of the ALSP includes a variety of useful and well-thought mitigation strategies that would benefit agriculture, it also includes measures that appear designed more to facilitate restoration of agricultural land for the benefit of listed species. The Commission recommends that the Delta agricultural community be invited to select a preferred administrator for the agricultural mitigation funding, and allow this administrator to work with the full range of ALSP strategies to determine the best measures to mitigate for the loss of Delta farmland. The ALSP must also be adequately funded to compensate for the many agricultural impacts related to BDCP.

Water Impacts: The BDCP has significant effects on Delta water quantity and quality and these impacts must be fully mitigated. The DEIR/EIS is inadequate because it fails to analyze and disclose the significant adverse impacts to the water supply for in-Delta water users. It also discloses a change in Delta water elevations, but fails to analyze the impacts of these significant elevation changes on Delta agricultural water diversions, recreational fishing and boating. Agricultural water quantity is also mentioned as a significant and unavoidable impact, but the DEIR/EIS fails to mitigate these completely avoidable impacts. The DEIR/EIS acknowledges that water losses related to construction dewatering may not be replaced with supplies sufficient to meet the preexisting demands or planned demands of the affected party but fails to mitigate those significant impacts on municipal and agricultural supplies in the Delta. In addition, the feasibility and effectiveness of phased actions to reduce salinity levels is uncertain, and are inadequate under CEQA and NEPA.

Water quality impacts to Delta water supplies include both an increase in dissolved organic carbon (affecting municipal supplies pumped from the Delta) and salinity (affecting both agriculture and municipal supplies). The DEIR/EIS lists these impacts as significant and unavoidable, and the only mitigation suggested is a vague description of assistance that “may take the form of financial contributions, technical contributions or partnerships.” There are many ways that these water quality impacts can and must be mitigated, including increasing (rather than decreasing) Delta outflows in drier months (especially in the fall).

In summary, the combination of an inadequate analysis of water conveyance and export alternatives and the lack of appropriate mitigation for community, recreation, agriculture and water impacts created by the proposed project argues for an entirely new approach to ensuring water supply reliability and restoration of the Delta.

B. INADEQUATE ANALYSIS OF ALTERNATIVES

The DEIR/EIS fails to include appropriate alternatives for analysis. All but one of the DEIR/EIS alternatives are variations of the preferred alternative. This narrow list of alternatives even ignores recommendations from DWR's own January 2008 "Risks and Options to Reduce Risks to Fishery and Water Supply Uses of the Sacramento/San Joaquin Delta" report, which identifies three scenarios with highest risk reduction potential, two of which are ignored in BDCP: Armored Pathway Through-Delta Conveyance and Seismically Improved Levees. The Commission's 2012 Economic Sustainability Plan (ESP) describes additional alternatives to ensure water supply reliability that were not considered; the ESP was peer-reviewed, approved by the Commission and largely incorporated into the Delta Plan. Analysis and consideration of the ESP and its recommendations should be incorporated into the EIR/EIS as an additional through-Delta alternative.

Informing this focus on narrow alternatives, BDCP's characterization of the condition of Delta levees (Appendix 3E) is at odds with the description of Delta levees included in the Commission's Economic Sustainability Plan. Specifically, BDCP builds a case for an isolated conveyance facility based on the fragility of Delta levees, without adequate consideration to significant Delta levee improvements made over the past several decades through the Delta Levees Subvention Program. The BDCP documents further neglect to address Delta levee improvements still necessary to reduce risks to people, property and state interests in the Delta (as required in the Delta Plan by California Water Code section 85305(a)), even though water exports would still rely in part upon the existing water conveyance system.

C. INADEQUATE MECHANISMS FOR ADDRESSING PROJECT IMPACTS

The Commission is concerned about the composition of the Authorized Entity Group (AEG) given its important role as the governance entity for the project, and supports Delta membership on the AEG to ensure that the project is operated in a way that takes into account Delta concerns. As proposed in the BDCP Implementing Agreement, the AEG is given authority to make final decisions over how Conservation Measures 2-22 are handled. Public bond funding is anticipated to provide over half of the funding for Conservation Measures 2-22; it is appropriate to include more public participation in the AEG, especially given the significant impacts upon the people and landscape of the Delta region.

In addition, a variation of the adaptive management contemplated for habitat restoration can and should be applied to socio-economic impacts to the Delta region. The project proponent should be responsible for monitoring project impacts and studying community impacts and regional economic impacts of the project to ensure that project actions are appropriately mitigated. For community and regional impacts, the project proponent could utilize the existing Delta Investment Fund established in the Delta Reform Act of 2009 (PRC section 29778.5) to advance regional economic sustainability and enhance Delta communities.

For individuals directly impacted by BDCP construction, there should be a simpler claims process to address economic damages related to tunnel construction activity. A mitigation measure should be added to establish a “Delta Compensation Fund” funded by the project proponent and administered by an impartial and independent third party. Modeled after the British Petroleum Deepwater Horizon Disaster Victim Compensation Fund and with funding sufficient to address deleterious impacts created by completion of the BDCP Conservation Measures (especially the construction of the tunnels) placed into an escrow account, the administrator of the Delta Compensation Fund would make payments directly to affected parties. This would both provide an impartial means of addressing negative impacts and a prompt method to compensate those affected.

These impacts and possible modifications are further described in the attached matrix. We ask that the comments contained in both this letter and the attached matrix be considered as our comments on the BDCP and associated environmental documents. From the Commission’s perspective, the biggest positive change that BDCP could make to improve the unique cultural, recreational, natural resource and agricultural values of the Delta would be to consider alternatives to the proposed 9000 cfs isolated conveyance facility and reduce the scale of the habitat restoration.

Again, we urge that thorough analysis be conducted on all alternatives that would achieve the co-equal goals while accomplishing the objective inherent in achieving them – to protect and enhance the unique cultural, recreational, natural resource and agricultural values of the Sacramento-San Joaquin Delta.

Sincerely,

Larry Ruhstaller
Chairman

cc: John Laird, Secretary of California Natural Resources Agency
Mark Cowin, Director of California Department of Water Resources
David Murillo, Regional Director of United States Bureau of Reclamation